By HB

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1158

ERONEOUS SHIPP, *et al.*,

Petitioners,

v.

MEMPHIS AREA OFFICE, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK GREENBERG
O. PETER SHERWOOD
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

WILLIAM E. CALDWELL
Ratner, Sugarmon, Lucas & Salky
525 Commerce Title Building
Memphis, Tennessee 38103

Counsel for Petitioners

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Petitioners Eroneous Shipp, et al., respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 7, 1978 and October 26, 1978.

OPINIONS BELOW

The December 20, 1974, order of the district court, which is not officially reported, is set out in the Appendix hereto, pp. 1a-8a. The September 25, 1975 opinion of the district court, which is not officially reported, is set out in the Appendix, pp. 9a-36a. The opinion of the court of appeals dated August 7, 1978, which is not yet officially reported, is reprinted in 17 FEP Cases 1430, and is set out in the Appendix, pp. 37a-54a. The order of the court of appeals denying rehearing, dated October 26, 1978, is set out at pp. 55a-56a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978. Petitioners filed a timely Petition for Rehearing, which was denied on October 26, 1978. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where a district court erroneously fails to certify a class action and subsequently dismisses the individual claim of the named plaintiff, can that failure be corrected on appeal, pursuant to Coopers & Lybrand v. Livesay, 57 L.Ed.2d 351 (1978), or does East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) preclude an appeal from such an error?

2. In a Title VII action alleging a class-wide policy of discrimination, may the individual claim of the named plaintiff be decided without considering whether there is in fact such a policy?

3. In order to "properly certify" a class action under Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975), need a district court do more than comply with the literal language of Rule 23(c)(1) by "determin[ing] by order whether it is to be so maintained"?

STATUTORY PROVISIONS AND RULES INVOLVED

Section 1291, 28 U.S.C., provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States....

Rule 23(c)(1), Federal Rules of Civil Procedure, provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

STATEMENT OF THE CASE

This action was commenced on September 16, 1971, against the Memphis Area Office of the Tennessee Department of Employment Security (hereinafter "TDES"), a state operated employment service largely supported by federal funds. The complaint alleged that TDES had a policy of referring white applicants to better paying jobs than those offered to equally qualified black applicants. Plaintiff alleged that this discrimination was the result in part of discrimination in the selection of the TDES counsellors involved in making the referrals. These practices were alleged to violate Title VI and Title VII of the 1964 Civil Rights Act. Plaintiff, a black applicant whom TDES had refused to refer to a particular job, sought relief for himself and for a class of blacks alleged to be the victims of these practices.

The complaint specifically alleged that each of the requirements for a Rule 23(b)(2) and a Rule 23(b)(3) class action were met. TDES claimed it had no policy of discrimination, but did not deny any of plaintiff's detailed allegations of numerosity, typicality, etc. Extensive discovery was

conducted from 1971 to 1974, most of it with regard to what were specifically denoted as the merits of the "class issues". At a pre-trial conference on March 8, 1974 plaintiff expressly sought a more formal ruling on the propriety of the class action, but the district court never entered any such ruling. The parties are in disagreement as to the reason for the district court's inaction; plaintiff maintains that the court took no formal action because counsel for TDES stipulated at the March 8,1974 conference that the case was a proper class action.

The trial of this action was held in two phases. From March 20-22, 1974, plaintiff presented his case in support of both his individual claim and the class claim, and TDES offered its defense to the individual claim. TDES was granted time to prepare its defense to the class claim; that evidence was finally presented at a second hearing on April 23, 1975.

With regard to the individual claim, the testimony at trial revealed that TDES had refused to refer plaintiff for a vacancy in the shipping department of the local RCA plant, although

plaintiff was a former military officer who had extensive experience managing shipments at an Air Force base in Europe. TDES officials asserted at the time of the refusal that plaintiff was unqualified because he was unfamiliar with shipping rates in the area, but the white applicant hired for the RCA job testified that the position did not in fact require any knowledge of those rates.

Plaintiff also established that in the years prior to trial the average hourly wage of positions to which TDES applicants were referred were as follows:

Type of Applicant	Average Wage
White males	$2.56
Black males	$2.25
White females	$2.25
Black females	$1.77

The average wage difference between whites and blacks was $.38 an hour. TDES classifies applicants into occupational categories according to their experience and level of skill. In the 16 largest categories, within which experience and skill levels were comparable according to TDES, white males got better paying jobs than black

males in every category. There were 13 major categories, all poorly paid, in which over 90% of the referrals were black, including domestic worker (100%), laundress and laundryman (99%) and janitor (95%). The TDES operations in Memphis, which until the early 1960's operated on an officially segregated basis, continued to use racially identifiable offices.

The district court, however, found for defendant TDES on both the individual and class claims. With regard to the claim of the named plaintiff, it is unclear from the opinion of the district court whether it concluded that plaintiff had been denied referral for reasons other than race, or that such discrimination had caused no injury because the job at issue had already been filled. 7a-8a. The district court decision regarding the named plaintiff was initially issued on December 20, 1974, prior to completion of the trial of the class claims. Plaintiff promptly moved for reconsideration of the individual claim after a decision on the class claim, and the district court in fact reconsidered and reaffirmed its rejection of the individual claim

after deciding the class claim. 36a. With regard to the class claims, the district court found that the wide disparity in the wage levels was primarily the result of past racial discrimination by private employers and "the community" rather than by TDES itself. 31a-35a.

On appeal the Sixth Circuit refused to consider the merits of the class claim. It upheld the dismissal of the claim of the named plaintiff, but it is again unclear whether the appellate court believed the district court had found no discrimination or no injury, and which finding it was affirming. 49a-50a. The court of appeals did not reach the merits of the class claims; it held, rather, that none of the district court orders regarding the class constituted an adequate certification of the class. 51a-54a. Plaintiff urged that, if the district court orders were inadequate, that error could and should be corrected on appeal. The Sixth Circuit, however, concluded that since the district court subsequent to that error had rejected the claim of the named plaintiff, dismissal of the class claim was required by East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395 (1977). 53a-54a.

Plaintiffs filed a timely Petition for Rehearing, and moved, under Rule 21, Federal Rules of Civil Procedure, to add additional plaintiffs. On October 26, 1978, the court of appeals denied the Petition for Rehearing, and held that it lacked jurisdiction to add parties to the action.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Resolve A Conflict Among The Circuits As to Whether An Erroneous Failure To Certify A Class May Be Corrected On Appeal Despite An Intervening Dismissal of the Claims of the Named Plaintiff

This case presents an important and recurring procedural problem. As viewed by the Sixth Circuit,[1/] the district judge, despite two requests by plaintiff's counsel, erroneously failed to decide whether the case should be formally certified as a class action. By the time the case

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1/ As we note infra, we maintain that the district court did adequately certify the class, pp. 21-26, and that the court of appeals erred in deciding the individual claim without first deciding the class claim. Pp. 17-21.

reached the court of appeals, however, the district court had decided against the named plaintiff on the merits of his individual claim, a decision the appellate court upheld. Petitioner urged that the court of appeals should correct the erroneous lack of certification. The Sixth Circuit, however, concluded that it was powerless to correct that error since plaintiff, although presumably a proper class representative when certification was first sought, had subsequently been held to have no personal claim and thus not to be a member of the alleged class. 51a-54a.

The circuits are widely divided on this issue. In addition to the Sixth Circuit,[2/] the Seventh[3/] and Eighth Circuits[4/] hold that an

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2/ The Sixth Circuit's position prior to the instant case had been unclear. See Carter v. Kilbane, 529 F.2d 1370, 1371 (6th Cir. 1975); Garrett v. City of Hamtrack, 503 F.2d 1201 (6th Cir. 1974); Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974).

3/ Winokur v. Bell Federal Savings and Loan Ass'n, 560 F.2d 271 (7th Cir. 1977); Valentino v. Howlett, 528 F.2d 975, 979-81 (7th Cir. 1977).

4/ Walker v. World Tire Corp., 563 F.2d 918, 921-23 (8th Cir. 1977); Allen v. Likins, 517 F.2d 532, 534-35 (8th Cir. 1975); Bradley v.

erroneous denial of certification cannot be corrected on appeal if in the interim the named plaintiff ceased to be a proper representative. The Second,[5/] Third,[6/] and District of Columbia[7/] Circuits take the opposite position, holding that an erroneous failure to certify can be reviewed and corrected by an appellate court, and that the appellate decision regarding certification "relates back" to the date on which the district court failed to certify the class.

4/ Cont'd

Housing Authority, 512 F.2d 626, 628-29 (8th Cir. 1975); but see Donaldson v. Pillsbury Co., 554 F.2d 825, 831-2 n.5 (8th Cir. 1977).

5/ Lasky v. Quinlan, 558 F.2d 1133, 1136-37 (2d Cir. 1977); Zurak v. Regan, 550 F.2d 86, 91-91 (2d Cir. 1977); Frost v. Weinberger, 515 F.2d 57, 64 (2d Cir. 1975).

6/ Geraghty v. United States Parole Commission, 579 F.2d 238, 245-254 (3rd Cir. 1978); Gardner v. Westinghouse, 559 F.2d 209, 214-17 (3rd Cir. 1977) (Seitz, J. concurring), aff'd 57 L.Ed. 2d 364 (1978). Geraghty relied on the decisions of the Second and District of Columbia Circuits. 579 F.2d at 250 n.48.

7/ Basel v. Knebel, 551 F.2d 395, 397, n.1 (D.C.Cir. 1977).

Other circuits have adopted a variety of intermediate standards. In the Fifth Circuit an erroneous denial of certification can be corrected on appeal if the plaintiff sought an evidentiary hearing on the propriety of certification, but apparently not otherwise.[8/] The practice of the Fourth Circuit is to decide whether the denial of certification was erroneous, but not to permit the original plaintiff to represent the class; instead the case is remanded to the district court with instruction that the case is to "be retained on the docket for a reasonable time to permit a proper plaintiff ... to present himself to prosecute the action."[9/] In the Tenth Circuit the denial of certification can and must be corrected on appeal if failure to do so would mean that the claim would "evade review."[10/]

8/ Satterwhite v.City of Greenville, 578 F.2d 987, 995-96 n.10 (5th Cir. 1978)(en banc), cert pending No. 78-1008.

9/ Goodman v. Schlesinger, ____ F.2d ____, 18 EPD ¶8659, p. 4607 (4th Cir. 1978); Cox v. Badcock & Wilcox Company, 471 F.2d 13, 16 (4th Cir. 1972).

10/ Napier v. Gertrude, 542 F.2d 825, 828 (10th Cir. 1976). The issue is apparently unresolved

The existence of this conflict is widely recognized. The Third Circuit, noting that the Fifth and Seventh Circuits had adopted rules different than its own, stated:

> We acknowledge that the courts of appeals are divided on the question of whether under the recent Supreme Court decisions, the denial of class action status is appealable by a named plaintiff whose claim has become moot. Geraghty v. United States Parole Commission, 579 F.2d 238, 251 n.19 (3rd Cir. 1978).

The Fourth Circuit recently conceded that its rule "is apparently contrary to the [Fifth Circuit] Satterwhite majority." Goodman v. Schlesinger, ____ F.2d ____, 18 EPD ¶8659, p. 4607 (4th Cir. 1978). Satterwhite in turn referred to the more restrictive Seventh Circuit decision with an understated "but see". Satterwhite v. City of Greenville, 578 F.2d 987, 996 (5th Cir. 1978).

This conflict reflects a disagreement among the lower courts as to the meaning of recent decisions of this Court. In holding that an

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10/ Cont'd

in the First and Ninth Circuits. See Cicchetti v. Lucey, 514 F.2d 362, 368 (1st Cir. 1975). Vun Cannon v. Breed, 565 F.2d 1096, 1101 n.7 (9th Cir. 1977).

erroneous denial of certification cannot be appealed if the claim of the named plaintiff has been rejected, the Sixth and Seventh Circuits analogized such a case to Rodriguez v. East Texas Motor Freight, 431 U.S. 395 (1977), where certification had never been sought, and Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975), where an inadequate certification had never been appealed. 53a-54a; Winokur v. Bell Federal Sav. & Loan Ass'n, 560 F.2d 271, 276 (1977). In permitting an appeal the District of Columbia Circuit suggested such a case is closer to Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), where the case was certified before the claim of the named plaintiff became moot. Basel v. Knebel, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977).

We contend that the issue presented by this Petition is controlled by the recent decisions of this Court holding that a denial of certification may not be the subject of an interlocutory appeal. Coopers & Lybrand v. Livesey, 57 L.Ed. 2d 351 (1978); Gardner v. Westinghouse Broadcasting Co., 57 L.Ed. 2d 364 (1978). In Coopers & Lybrand, this Court rejected a claim that such a denial was

"effectively unreviewable on appeal from a final judgment" and thus an appealable collateral order under Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949); this Court insisted that "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff...." 57 L.Ed. 2d at 358 (emphasis added). In Gardner the Court held that denial of certification was not an "irreparable" denial of class injunctive relief, emphasizing that "if, after judgment on the merits, the relief granted is unsatisfactory, the question of class status is fully reviewable." 57 L.Ed.2d at 368 n.6 (emphasis added). This passage is a quotation from the Third Circuit opinion in Gardner, and there the evident concern of the court of appeals was to insist that a denial of certification could be appealed after final judgment regardless of whether that judgment rejected or mooted the claims of the named plaintiff. Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 214-15 (3rd Cir. 1977) (Seitz, J., concurring).

The decision below, and many of the conflicting decisions in other circuits, address the situation where a named plaintiff no longer has an

active claim against the defendant because his claim was rejected on the merits. But the same problem arises if the named plaintiff prevails, for should full relief be awarded to him and the defendant not appeal, the dispute between the defendant and the named plaintiff would be moot. Thus the Eighth Circuit has held that a named plaintiff is barred from appealing a denial of certification not only when his claim has been rejected,[11] but also when he has obtained all the relief he personally sought in the action.[12] The Seventh Circuit has held that a defendant can deliberately prevent an appeal from a denial of certification simply by tendering the plaintiff all the relief he personally requested, thus mooting his claim.[13] If these decisions are correct, appellate review after final judgment of a denial of certification would

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11/ Walker v. World Tire Corp., 563 F.2d 918 (8th Cir. 1977).

12/ Allen v. Likins, 517 F.2d 532 (8th Cir. 1975).

13/ Winokur v. Bell Federal Sav. & Loan Ass'n, 560 F.2d 271, 274 (7th Cir. 1977).

be impossible, not merely in some cases, but in most. If that is so Gardner and Coopers & Lybrand were incorrectly decided.

The decision in this case, like the similar rule in the Seventh and Eighth Circuits, creates an unprecedented anomaly in federal law: an erroneous district court decision denying certification, or an erroneous failure to act on a request for certification, is absolutely insulated from appellate review. In authorizing appeals from "final orders" under 28 U.S.C. §1291, it was the intent of Congress that that appeal bring up with it all previous orders entered and actions taken by the district court, "to have the whole case and every matter in controversy in it decided in a single appeal." McLish v. Roff, 141 U.S. 661, 665 (1891). Postponement of appellate review of a denial of certification is intended only to determine when that review is to occur, not to "defeat the right to any review at all." Cobbledick v. United States, 309 U.S. 323, 324-25 (1940).

II. The Decision Of The Court of Appeals, Insofar As It Holds That An Individual Claim of Discrimination Can Be Rejected Without Deciding Whether There Is A Pattern or Practice of Discrimination, Is Inconsistent With The Decisions of This Court and of Three Circuits

In deciding the individual claim of the named plaintiff, the district court repeatedly recognized that the resolution of that claim depended to a substantial degree on whether, as plaintiff claimed, the defendant had engaged in a general practice of discrimination against black applicants. After hearing all the evidence on the individual claim, the trial judge agreed to defer any decision on it until he could decide the class claim as well.[14/] The judge subsequently issued a tentative opinion on the individual claim, holding that the plaintiff had failed to meet his burden

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14/ Transcript of Hearing of March 22, 1975, pp. 129-130.

of proving discrimination. 7a-8a. But the trial court agreed to reconsider its view of the individual claim after deciding the class claims, and only finally rejected the individual claim on the basis of its determination that there was no general practice of discrimination. 36a. On appeal the Sixth Circuit proceeded in an entirely different manner. It disposed of Shipp's personal claim in a single unexplained sentence asserting that the finding of no discrimination was "not clearly erroneous", 49a-50a; but it expressly did not decide whether the district court had erred in finding no class-wide discrimination, even though that finding was a foundation of the district court's rejection of the individual claim. 54a.

This Court has repeatedly held that the existence of a pattern of discrimination is of critical importance to resolving a claim of discrimination against a particular individual. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973), held that a defendant's "general policy and practice with respect to minority employment" would be relevant to a claim

that the plaintiff there had been rejected for employment because of his race. Both Teamsters v. United States, 431 U.S. 324, 357-62 (1977), and Franks v. Bowman Transportation Co, 424 U.S. 747, 772-73 (1976), hold that proof of a general practice of discrimination shifts to the defendant the burden of proof, requiring it to establish that an unsuccessful minority applicant was not rejected because of his or her race.

Under Teamsters, Franks and McDonnell Douglas an individual claim of discrimination cannot ordinarily be decided without first deciding whether there is a class-wide pattern of discrimination. Three circuits expressly require that the plaintiff be permitted to establish the latter issue prior to a determination of the former.15/

The court of appeals in the instant case refused to decide the merits of the class claim of

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15/ Lamphere v. Brown University, 553 F.2d 714, 719 (1st Cir. 1977); Burns v. Thiokol Chemical Corp., 483 F.2d 300, 306 (5th Cir. 1973); Donaldson v. Pillsbury Co., 554 F.2d 825, 832-33 (8th Cir. 1977), cert. denied 434 U.S. 856 (1977).

a pattern and practice of discrimination, even though that was the foundation of the district court's opinion. It upheld the district court's conclusion of no discrimination against Shipp without considering the correctness of the district court's premise that there was no general practice of discrimination. This resolution of the merits was inconsistent with Franks, Teamsters, McDonnell Douglas and the practice in other circuits.

This issue is inextricably intertwined with the first Question Presented. Even in a case where a trial judge erroneously denies certification, the individual plaintiff would be entitled under Franks, Teamsters, and McDonnell Douglas to discover and introduce evidence of a general practice of discrimination in support of his own claim. Ordinarily a district court finding of no discrimination against the named plaintiff could not be upheld if the court of appeals found there was a class-wide pattern or practice of discrimination. Thus the only way an appellate court could reject an individual claim and then dismiss a possibly meritorious class claim for want of a proper representative would usually be to dis-

regard Franks, Teamsters and McDonnell Douglas and refuse in passing on the individual claim to consider whether there was a general practice of discrimination. Consequently in this case, as in most others, the court of appeals only had an opportunity to erroneously dismiss the class claim because it had first erroneously rejected the individual claim.

III. Certiorari Should Be Granted To Clarify What Form Of Order Is Required To Constitute A "Class Certification" Under Rule 23(c)(1)

Rule 23(c)(1), Federal Rules of Civil Procedure, provides in pertinent part:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.

The Committee Note indicates that the Rule means simply what it says, that the order must determine "whether an action brought as a class action is to be so maintained." 3B Moore's Federal Practice ¶23.01[11.-1] (emphasis added). Until the decision in this case, no opinion of this or any lower court read Rule 23(c)(1) other than in that literal manner.

The Sixth Circuit did not question that the district judge had in fact determined "whether" the case was to be maintained as a class action; on the contrary, it noted that there had actually been a "trial on the merits of the class action claims" and a decision "on the merits" of those claims. 40a-42a, 46a n.15. Nor is there any suggestion that the district judge, having determined that the case could proceed as a class action, failed to enter an order memorializing that determination. Actually there are ten such orders. The trial judge issued four orders authorizing and regulating discovery expressly bearing on "the class action issue of the case",[16/] and five orders, including the pretrial order, providing for how and when the "class action aspect of the case" was to be tried.[17/] In its

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16/ Court of Appeals Appendix, pp. 21a (July 16, 1973), 30a (December 11, 1973), 48a (December 17, 1973). A fourth order was issued on March 15, 1973.

17/ These orders were issued on March 11, 1974, March 22, 1974, June 13, 1974 (id. p. 738a), December 20, 1974 (id. p. 744a) and January 5, 1975.

decision on the merits the district court included a finding that it had "jurisdiction of ... the class action allegations made by plaintiff Shipp". 31a.

The Sixth Circuit, however, found all of these orders insufficient to meet the requirement of Rule 23(c)(1). Its opinion suggests the district court orders were inadequate for three reasons. First, the court of appeals objected that the trial judge had failed to make detailed findings that each of the requirements of Rule 23 were met.[18/] Second, the court of appeals complained that the trial judge had failed to specify the subsection of Rule 23(b) under which the class action was to proceed. 47a-48a. Third, the court of appeals repeatedly stressed that the trial judge had failed to "certify" the class, indicating that the use of this term was necessary or of special importance. 47a.

18/ "[T]he district court never ... made any determination that the prerequisites for a class action were met, specifically that plaintiff's claims were typical of the claims of the class or that plaintiff would fairly and adequately protect the interests of the class pursuant to Rule 23(a)." 46a.

The court of appeals apparently based these requirements, and its conclusion that the class was not "properly certified", on its reading of Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975). 53a. But Jacobs does not require that a Rule 23(c)(1) order do more than actually determine whether a case may be maintained as a class action. In Jacobs the order rejected as insufficient by the majority stated only that plaintiffs were "qualified as proper representatives of the class whose interest they seek to protect." 420 U.S. at 130. This clearly did not decide whether the action was to be heard as a class action, but merely held that the requirement of Rule 23(a)(4) had been satisfied. Similarly in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), counsel for the parties had "treated [the case] as a class action", 427 U.S. at 430, but there was no proof the trial court had done so.

On three occasions this Court has held the order of a district court sufficient to satisfy the requirements of Rule 23(c)(1) and thus of

Article III. Kremens v. Bartley,[19] 431 U.S. 119 (1977); Franks v. Bowman Transportation Co.,[20] 424 U.S. 747 (1976); Sosna v. Iowa,[21] 419 U.S. 393 (1975). None of the orders approved by this Court could meet the three-part standard set out by the Sixth Circuit below. None of the orders in Kremens, Franks and Sosna made express findings that each of the particular requirements of Rule 23(a) and (b) were met, and none of them used the term "certify". The order in Sosna neither specified the subheading of Rule 23(b) being utilized nor defined the class. The decision below is clearly inconsistent with this Court's approval of the orders in Kremens, Franks and Sosna.

The Sixth Circuit's requirements for a Rule 23(c)(1) order, if applied only prospectively, would nonetheless be erroneous. But the court of

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19/ The order is set out at p. 270a of the Appendix, No. 75-1064, October Term, 1976.

20/ The order is set out at p. A53 of the Appendix, No. 74-728, October Term, 1975.

21/ The order is set out at pp. 45-46 of the Appendix, No. 73-762, October Term, 1974. The document in Sosna was a stipulation of fact approved by the district court. 419 U.S. at 397-98.

appeals applied those newly announced standards to orders issued three to four years earlier. The retroactive application of such a construction of the Federal Rules is certain to wreak havoc in other cases as it did here, for few Rule 23(c)(1) orders would meet those standards. Otherwise well tried cases will have to be dismissed because of a failure to meet procedural standards of which neither counsel nor the trial court could have been aware. To do so would be to elevate form over substance in a manner entirely inconsistent with the purposes of the Federal Rules of Civil Procedure.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted.

JACK GREENBERG
O. PETER SHERWOOD
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

WILLIAM E. CALDWELL
Ratner, Sugarmon,
Lucas & Salky
525 Commerce Title Building
Memphis, Tennessee 38103

Counsel for Petitioners

APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-71-373

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ERONEUS SHIPP, Individually and on behalf of all others similarly situated,

Plaintiff,

v.

MEMPHIS AREA OFFICE OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Defendants.

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ORDER

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Plaintiff, a black male, has sued the Memphis Area Office of the Tennessee Department of Employment Security, the Tennessee Department of Personnel, and Jane L. Hardaway, its (former) Commissioner, for alleged racial discrimination with

respect to its failure to refer him to a job through the Tennessee Department of Employment Security at Memphis, Tennessee. Jurisdiction is asserted under the post-Civil War civil rights acts and the 1964 Civil Rights Act as amended (Title VII). By order of the Court, after extended discovery, trial was had on Shipp's claim with opportunity for defendants to respond at a later hearing on the merits of the class action claim.

Plaintiff, a native Memphian and a college graduate, has considerable service as an officer in the Army Air Force in handling military corgo and passengers. After termination of his military service as a first lieutenant, he attended graduate school for a time in 1963, but was unable to obtain suitable employment in New York City where he was then living. After unsuccessfully applying for employment in Memphis in 1964, he taught for several years in Arkansas public schools and then taught language and English in the Memphis City School System after obtaining a required certificate in Tennessee. On Friday, March 7, 1969, after hearing a radio broadcast the day before

initiated by the Memphis Office of the Tennessee Department of Employment Security, Shipp called to inquire about a job opening for an assistant or analyst in a traffic department. He talked to Mrs. Ewing in the Tennessee Department of Employment Security office about his interest and background and was advised to come in for an interview for possible employment on March 11, although she was not encouraging that his qualifications were suitable for this particular spot. He reported in person, however, on March 10, with an application, and talked to Mrs. Askew at the Tennessee Department of Employment Security office. She also discouraged him about the particular job which offered higher pay than the approximately $6,700.00 Shipp had been earning, since the job required heavy experience in rates, and suggested that he consider other possible openings.

Shipp, suspicious that he was being shunted aside, demanded an opportunity to interview the employer. Mrs. Askew responded that it was against policy to reveal the "client's" or prospective employer's name unless the Tennessee

Department of Employment Security itself considered the applicant qualified and recommended the interview. With notebook and pencil in hand, Shipp began to take notes of his interview with Askew, who at his insistence, then dialed on the telephone the employer, RCA at Memphis.

Shipp did not believe Mrs. Askew[1/] actually made the call, but heard one side of the purported telephone conversation while she spoke to Robert Phillips in the RCA personnel office and heard her ask if the job were filled. She then informed Shipp that the job was not open, that the employer did not consider his background sufficient for the job and was not interested in an interview. Still not having RCA's name divulged as the prospective employer, Shipp even more dissatisfied, then demanded to speak to Mrs. Ewing who had returned to her desk in the commercial and sales division of the Tennessee Department of Employment Security office during the course of his discussion with Mrs. Askew. He stated he did not believe Mrs. Askew had actually made the call but had only

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1/ Mrs. Askew was a supervisor, Mrs. Ewing an interviewer, at the time in the same department. Both are white.

pretended to do so, and was still apparently taking notes of what was taking place. At this time, Shipp intimated that he felt he was being mistreated and misled by reason of his negro race in connection with this job. He wondered why the job was already filled under the circumstances known to him, and indicated no interest in other possible openings. Despite Shipp's insistence, Ewing refused to call RCA again, stating she could not try to bypass her supervisor. Shipp was taken to the Tennessee Department of Employment Security manager's office after asserting these complaints, which created something of a commotion in this division of the Tennessee Department of Employment Security.

Unknown to Shipp, however, RCA's personnel office had also solicited job applicants from private employment services during February of 1969, as well as the Tennessee Department of Employment Security for the traffic department job, dealing particularly with transportation and shipping rates. The Tennessee Department of Employment Security submitted several potential names of white persons for the job to RCA prior to the Shipp episode, and Phillips had several

conversations with Ewing indicating a desire for recent rate experience. Phillips also interviewed one B. E. Fletcher during February, then employed at Central Soya, and on or about March 4, 1969, Fletcher gave his employer notice that he intended to resign and accept the RCA position in controversy. Phillips, however, did not then notify the Tennessee Department of Employment Security that the job was considered filled, even though Fletcher had prospectively been offered the job to report about mid-March. RCA at the time had an affirmative action program after some contact with E.E.O.C. representatives. Phillips did not know Shipp's race and was not told his race on March 10th when Askew of the Tennessee Department of Employment Security discovered the job was no longer open.

Evidence was presented on Shipp's behalf of a background indicating segregation by race prior to 1964 in Tennessee Department of Employment Security employment offices. Evidence was also presented showing a preponderance of whites in managerial, supervisory and interviewer positions in the Tennessee Department of Employment Security office in Memphis in 1969. Statistical evidence

was also offered with analyses, which plaintiff's counsel asserts is indicative of a plan, practice, or effective result of racial discrimination by this office (and defendants) at the time suit was instituted and when Shipp's interview took place.

The Court concludes, however, that Shipp himself has failed to demonstate racial prejudice or discrimination against him in connection with his job application and his transactions with the Memphis Tennessee Department of Employment Security Office in March of 1969. Shipp has failed to prove the charges made by him against any of the defendants. As an aside, it is pertinent to note that Shipp also failed to prove any damage whatsoever by reason of his not receiving the RCA job. That Memphis operation closed about six months later and most employees lost their jobs. Both Phillips and Fletcher in the fall of 1969, had to seek other employment. Shipp himself averaged some $7,500 in earnings during 1969-1970, and 1970-71 school years.

The cause of action brought by Eroneous Shipp is dismissed and he will bear his own costs which are assessed against him. This dismissal, how-

ever, is without prejudice to the consideration of the class action claims, equitable in nature, seeking affirmative relief against defendants for alleged unlawful discriminatory employment practices. Nothing indicated in this order is intended to be a determinative finding or conclusion with respect to the asserted class action claim.

A hearing on the merits of the latter claim is set for January 6, 1975, at 9:30 A.M.

This _____ day of December, 1974.

Harry W. Wellford /s/
UNITED STATES DISTRICT COURT JUDGE

Filed: December 20, 1974

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-71-373

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ERONEUS SHIPP, Individually and on behalf of others similarly situated,

Plaintiff,

v.

MEMPHIS AREA OFFICE OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Defendants.

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MEMORANDUM OPINION

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Plainiff, Eroneus Shipp, commenced this action by complaint filed on September 16, 1971, against defendant Memphis Area Office of the Tennessee Department of Employment Security (here-

after called, as indicated, "Memphis Area Office," "Memphis Office," or "TDES"). This was filed as a class action on behalf of similarly situated black persons charging defendant with individual and class-wide race-based discrimination in its job referral and related services, as well as in its own employment practices. Such alleged racially discriminatory actions were asserted to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200 et seq., [sic.] the Civil Rights Act of 1866, 42 U.S.C. §1981, and 42 U.S.C. §1983, as well as the Fourteenth Amendment to the Constitution of the United States. Plaintiff sought individual as well as class-wide equitable relief against defendant.

The court entered an order on December 20, 1974, after hearing with respect to Shipp's individual claim, denying him relief but without adverse effect upon the class action aspects of the case. Further hearings were held as to the latter asserted class action claims, and expert testimony was adduced by both sides.

The basic issues involved were (1) whether blacks, because of race, were referred to employers by TDES to jobs poorer in quality and in

pay than those to which whites were referred; (2) whether TDES failed to use appropriate and/or necessary procedures to eliminate relationships with allegedly racially discriminatory employers; (3) whether TDES discriminated against blacks in internal hiring and promotion practices; and (4) whether TDES established or continued the racial identifiability of certain job categories because of past racial practices.

TDES was created in response to the problems spawned by unemployment. It consists of two coordinate divisions, the unemployment compensation division and the state employment service. T.C.A. §50-1332. The employment service division is financed by the United States Department of Labor to maintain free public employment offices throughout the state pursuant to 29 U.S.C. §§49 to 49(k), and subsequent federal legislation. (T.C.A. §50-1346). The employment service division in Memphis is the subject of this litigation. Historically the Memphis Area Office operated on a racially segregated basis until the late 1950's. A separate office serving primarily blacks was maintained in Memphis by TDES until approximately

1960.[1] Subsequently the office was moved to a new location serving both whites and blacks, although the domestic and casual labor office continued to deal primarily with black employees. When all the activities were combined in a single office at 1295 Poplar in 1969, this Memphis office of TDES handled a full range of both white and black clientele. After the Civil Rights Act of 1964 was adopted, however, explicit racial specifications for jobs or applicants were eliminated, although by 1962 blacks were being serviced by the office which had formerly handled white job applications. The TDES staff in the primary office at 1295 Poplar began to be filled with a significant number of blacks by 1968, whereas before it was predominantly but not exclusively white in racial make-up.

In 1970, significantly altering the operation of TDES in Memphis, a Job Bank computer-assisted information system was implemented, and Memphis was selected by the Department of Labor as one of a handful of cities to participate in an experimental "Conceptual Model" (hereafter, "COMO")

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[1] This was separate from a farm office which serviced primarily black farm laborers.

approach to the delivery of manpower services. Prior to that time TDES interviewers specialized in occupational categories, and they dealt with both employers and applicants in their assigned occupational "specialities." These interviewers viewed and referred applicants seeking jobs, and would conduct "file searches" in an effort to match pending job orders in the specified occupations with pending applications for those particular jobs. Applicants could find out what jobs were available from interviewers.

The Job Bank program came into being under Manpower Development and Training Act to improve the problem of communication about jobs. The Job Bank is designed to afford more immediate availability of orders through a central control and to allow city-wide exposure of applicants to listed jobs. A part of the philosophy behind the Job Bank program was the improvement of opportunities for disadvantaged persons and minorities. One of the intended benefits of the design of the Job Bank was to separate job order-taking from the interviewing and referral process. It was hoped that this program would help disadvantaged applicants in the availability of openings to all

interviewers so as to reduce the danger of "playing favorites." It was also expected that the new computerized information-gathering system would better enable local employment service offices to identify the characteristics of job-seekers who are not recieving maximum benefits of such service. This program, according to one of plaintiff's own experts did not produce in Memphis or elsewhere all the desired effects and advantages.

On April 15, 1970, the Memphis Office began the COMO operational program in conjunction with the Job Bank system, again with a primary goal of serving the disadvantaged more adequately, and the "hard core" unemployed. The purpose of the COMO design was to improve the manpower delivery system by "self-service use by job ready applicants of a computerized Job Bank listing of job openings and other information about job opportunities;" "job-finding assistance and instruction, job development, and job market information for applicants who are unsure of their degree of job-readiness;" "a controlled caseload, team approach to provide a hard-core and disadvantaged with the full range of intensi-

fied manpower services." The Memphis TDES office was organized in a manner deemed effective to deliver all of these levels of service to those with greatest need for manpower services.

A detailed application card is filled out when an applicant at TDES applies. It reflects the applicant's work history and other information necessary for occupational or DOT coding[2/] and other information necessary for referral action. The back of this application card contains information pertaining to test results, if any, and other special information, as well as a record of job referral action for the particular applicant and follow-up contact information. For those who have not previously filed applications, there is an intake and briefing session which explains the operation of the office. Applications are filled out at the receptionist desk and

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2/ The Dictionary of Occupational Titles (DOT) is a system of coding types of jobs designed by the Department of Labor. The system utilizes a six-digit code in which the first three digits indicate the job or the occupation, and the second three digits indicate to what extent particular job requires the employee to relate to data, to relate to people, and to relate to things.

filed by occupational code with a cross index. The applications are maintained on file until the applicant is placed, or until 60 days from the last contact. Applicants who are not "job ready" or who need more special attention for some reason are referred to counselors. A more detailed counseling control card is maintained for this group of job seekers. Applicants who do not need special attention or help go to the Job Bank viewers where they may look for job openings in areas of their interest or look generally at all job openings available that day. When an applicant selects a job in which he is interested he then goes to a interviewer who determines his eligibility for the job in question, checks with the Order Taking Unit to see if the job is still open and whether the number of referrals requested by the employer have already been made. An applicant who is referred to a job is given a Job Bank referral slip to deliver to the employer. The employer indicates the action taken on the referral and returns this slip to TDES.

When an employer telephones TDES in Memphis seeking applicants for a job opening, a person in the Order Taking Unit (who, although classified as

an interviewer, does not necessarily have contact with applicants) takes down all relevant information pertaining to the opening on a job order form. That job order is transmitted daily by wire to the TDES computer center in Nashville where the information is transferred to microfilm cards and returned to Memphis the next morning for use in the Job Bank. The information available to applicants contains all relevant data about the job but the microfilm viewers do not reveal the employer's name. (The employer's name and other data are available, however, on the viewers used by interviewers and counselors of TDES.)

Although the Memphis Office operates branch offices and conducts activities related to the primary function of job referral and placement, most of the operation is now conducted at one main location. In May of 1973, however, the Commercial, Professional & Technical Division moved from the main office to another location. Applicants seeking clerical, professional or technical jobs are now referred to that other location nearby, which handles a higher percentage of while [sic] applicants than the main office. This CP&T office handles higher-paying and

better quality positions such as clericals, engineers, bookkeepers, etc. This separate unit maintains its own applicant files and does its own file searches, and all applicants seeking employment in these occupational classifications are referred to the separate CP&T office. The vast majority of employees at the latter office are white. The Memphis Office still operates a separate "Domestic and Casual Labor" unit. Casual, day, domestic, and farm applicants are now handled in an annex at the main office location. Most of the applicants handled in this unit are for jobs of three days duration or less, such as warehouse loading, yard work, and miscellaneous jobs of this type. The unit also handles such full-time jobs as domestic help. This unit is not, however, a part of the Job Bank operation and job orders are taken directly by the unit without coming from central control.

The procedures described as employed beginning in 1970 and up to the present are more efficient and helpful to job applicants, including blacks. There has been continued improvement in service to black and minority group job applicants in the Memphis office of TDES since 1970. The Job Bank system has increased the participa-

tion of black applicants in job opportunities and areas previously available, for the most part, to white applicants.

State employment agencies, including TDES, that receive federal assistance in the implementation and operation of job opportunity programs are not to refer appplicants to employers known to be engaged in racially discriminatory employment practices. Employer relations unit representatives of TDES have responsibility to deal with employers and to counsel those who may be believed or found to engage in racially discriminatory acts or procedures, and they may initiate recommendations to cease "doing business" with such employers. Normally, however, an interviewer or order taker within the TDES would initiate information or request for action relative to an alleged discriminatory employer. Such an employer's card may be marked for "control" purposes and excluded from use as being a racially discriminating "suspect" employer. Normally, however, the use of tests, even though not validated, would not place an employer in such a category. There is an area equal employment opportunity representative (formerly called a minority group represen-

tative) whose responsibility essentially is to gain compliance with the 1964 Civil Rights Act as amended, and to coordinate activities of TDES with local race sensitive agencies.

In 1971, the percentage of minority race persons of TDES was approximately the same as that of the percentage of minority to the whole number of State of Tennessee employees. The Personnel Department of the State of Tennessee, however, at this time had a lesser percentage of black and minority employees. Under a new State administration, however, after 1971 these percentages improved as to incidence of black employees, including those in supervisory positions. The defendant department heads initiated actions to improve utilization of black employees prior to the filing of this suit. In 1971, the percentage of black employees in the Memphis Office of TDES was approximately twice that of the State as a whole (approximately one-fourth), although there were relatively few interviewers in the main office. The majority of the traffic in the Memphis Office then and now, however, is black. There is still some opportunity for discrimination by interviewers and others in

the Memphis office since 1970, but plaintiff has failed to demonstrate by proof specific instances of such discrimination. There still must be judgments made of applicants' abilities, file search suitabilities, and code ratings, but no system can avoid the possibility of discrimination.

In dealing under guidelines suggested by the Department of Labor with suspected discriminatory employers, TDES procedures causes them to be placed "on control" or to be eliminated as sources of employment pending investigation and attendant circumstances. It was not the practice of TDES to notify the local office of the Equal Employment Opportunity Commission if discriminatory practices were suspected of a given employer, nor did TDES refuse to serve employers who administered tests which might prove to have disparate effects on blacks. An area Equal Employment Opportunity representative, a black, was appointed after passage of Titles VI, VII of the Civil Rights Act of 1964 to serve as liason with community agencies and to improve minority group opportunities and representation.

According to plaintiff's data, by trial of this cause, 34% of Memphis Area Office employees were black, roughly equivalent to the percentage of black adult population in the City. Some were classified as managers, others as counselors, interviewers, clerks, typists, ERR's, and "agents." The higher salaried positions generally, however, reflected relatively fewer blacks, because 38% of the whites had been hired before 1964 and only 13% of the blacks had been hired before that date, giving the blacks relatively less seniority and experience. This was borne out by the data indicating that the higher salaried blacks, for the most part were hired before 1964, and the same situation prevailed for whites. Significant advancement was made by blacks as counselors and managers in recent years.[3/] Black employees do fill most of the lower paying positions. Most of the white interviewers had been hired prior to 1964, while most black interviewers were hired after 1964.

3/ For instance, 35% of counselor II positions were filled by blacks; 50% of counselor III positions, and 25% of counselor I positions.

The State of Tennessee follows a civil service system in which classified civil service job openings are filled (whether by new hires or by promotions) in accordance with a classification system established by the Department of Personnel. See TCA §8-3001 et seq. Generally, an employment certification list is maintained and State agencies hire from the top five eligibles, and in the case of promotions, vacancies are filled from the top three eligibles for promotion. Tests are usually involved, or have been involved in many classifications. In the case of the position of interviewer at the Memphis Office of TDES, for example, tests are involved and performance is an important factor in selection. Validation studies in connection with these tests were being made at time of trial. The Department of Personnel furnishes TDES the names of eligible as to the interviewer (and other) classifications. TDES is considered to be a total "civil service" agency except as to non-skill, lower paying positions. Prior experience is, of course, a factor in TDES promotions, and Memphis Area Office appplicants are given priority over those from other areas.

The Department of Personnel has not identified the race of persons on eligibility lists in accordance with U.S. Civil Service Commission requirements. Generally, according to plaintiff's counsel's contentions, minority applicants, based on test scoring, do not attain the top three or top five positions.[4/]

Blacks, according to 1970 census figures, in Shelby County, Tennessee, comprised a substantial majority of "poverty level" or less economic family units, although they comprised only about a third of the population, and they experienced more than twice as much unemployment proportionately. Some studies attribute the disproportion to "institutionalized behavior" as contrasted to specific discriminatory conduct in the Memphis area in considering the heavy concentration of blacks in relatively low-paying jobs. This is part of a national problem with respect to urban minority employment.

In 1966, the relative occupational position of black males in the Memphis area in comparison

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4/ See proposed finding #34, (plaintiff's).

to whites was approximately the same as in the South as a whole, although there was a substantial gap between the average income of black and white males, and this gap continued into 1970. In 1969 there were 22,422 white referrals, 35,480 non-white job referrals by the Memphis Office of TDES in response to 31,198 job "orders." There were 23,186 placements, of which 7,309 were white, 15,877 non-white. In 1972, there were 19,668 white referrals, 36,829 non-white, in response to 41,911 job orders, resulting in 20,084 placements, of which 14,054 were non-white. Unquestionably the TDES Office was an important source of jobs for blacks in Memphis as well as in the United States as a whole. In 1973,[5/] 66% of referrals were to blacks, and 58% of placements were to blacks. There was, however, a difference in that same period of about thirty cents an hour in the average hourly rate of black and white males in the jobs to which they were referred. There was even a greater differential, over-all, between

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5/ Over a ten month period analyzed by plaintiff's expert, Dr. Joseph C. Ullman, a consultant with the Department of Labor's Manpower Administration.

black and white females. The disparity, however, between the races as to job referral differentials decreased as educational levels increased. References to Dr. Ullman's analysis of data on behalf of plaintiff is made to a ten month 1972-1973 period in which defendant TDES computerized figures were made available to plaintiff. The differences were determined by plaintiff's expert to be statistically significant.

From the over-all 68% average of referrals to black males during the period analyzed, there was only a slight difference in the ratio referred to so-called "higher paying industries" and to "low wage industries," but there was about a ten percent variance from the norm in the case of referrals of black females in respect to "high pay" and "low pay" categories.This was due, primarily, to the large number of black females, largely uneducated, unskilled, and unexperienced, who were referred in domestic and service positions. There was not a signficant gap, however, in average referral wage rates of black and white females to "high-wage industries" during this period studied. This was a contrast to the

significant differences in the other categories mentioned as to both male and female referrals. More blacks were referred, on a percentage basis, to low-skill jobs than to high-skill jobs, based on DOT codes used by the Department of Labor in compiling its statistics. When skill and experience were demonstrated to be job requisites or desirable, the proportionate differences between black and white referrals proved to be less significant. Other than possible discrimination involved, by the employer, or by some TDES employee, Dr. Ullman thought a likely explanation for the disparity to be based on more job experience on the part of white applicants, and that TDES "interviewers are referring whites with experience in preference to blacks without experience." His opinion was that a presently racially neutral policy on the part of TDES, particularly the Memphis office, in referring more job experience whites than less experienced blacks, has an effect of perpetuating past discrimination. He conceded, however, that substantially disportionate effects would be required on the part of TDES to place the higher percentage

of uneducated or comparatively uneducated blacks, unskilled as well as inexperienced, in comparison to better educated (attaining a higher grade level), more skilled and more job experienced whites, particularly as to hard core unemployed. For instance, defendant's expert, Dr. Bernard R. Siskin, in studying the same ten month statistics, concluded that "it is almost three times more likely that a white applicant is high-skilled than a black is high-skilled." He also concluded that the data studied was misleading and inaccurate because it did not relate to individual applicant data or experience rather than referral data.

Dr. Siskin's[6/] conclusions were in many areas contrary to those of Dr. Ullman. For example, he found that black females were being disproportionately referred to permanent jobs, in comparison to temporary jobs, than were white females, whereas black males were being disproportionately referred to temporary jobs, but this he explained was due to black males being referred to laborer jobs which they were seeking more than were white males. He found that it took more than

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6/ Dr. Siskin of Temple University has testified also for plaintiffs in discrimination cases.

50% more referrals to place a black than a white and concluded that this situation reflected upon the statistical data relied upon by Ullman. After adjustment, taking this factor into account, the racial disparity in regard to referrals to high-skill or low-skill jobs was reduced significantly, particularly as to males. His conclusion was that the TDES data showed that agency to be acting in a "complete racially neutal manner," in Memphis, and was, moreover, not inconsistent with some affirmative action indications.

In substance, Dr. Siskin found disparities between the races due primarily to differences in skills, education and other factors after analyzing the data. He found no evidence that racial discrimination played any significant role in practice or procedure during the 1972-1973 period studied in the Memphis office. Particularly as to those with high school education or better, he found differences, if any, with regard to referrals to be relatively unsubstantial and of no practical significance with respect to race. He found an over-all wage differential, as adjusted, of approximately 18 cents but considered this difference to be accounted for

by considerations of disparities in skills, experience, and special education. Over-all, public employment service, such as that of TDES, handles only about five percent of total job placement in the economy, but it is an important employment factor to blacks.

Whites who apply at the Memphis Office of TDES are almost twice as likely to have high skill experience than blacks; 25% more, in proportion, of white males have at least a high school education than black males; 30% more white females have at least a high school education than black females.[7/] Approximately 40% of blacks so applying have less than a high school equivalent, whereas only 10% of white females are in this category, and only 15% of white males. In the Memphis community at large approximately 37% of black employees are categorized as laborers, compared to less than 6% of white males. Approxi-

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7/ It is more than five times as likely that black female applicants to the Memphis Office will have a ninth grade education or less in comparison to white females; three times as likely black males will be so educationally handicapped in contrast to white males. (16% to 3% in case of females, 16.5% to 5% in case of males).

mately 75% of black employees were categorized as laborers or "operatives" (56% of black females), as compared to 27% white males (21% white females) so categorized in 1969.

From these findings the court concludes that the court does have jurisdiction of this cause, including the class action allegations made by plaintiff Shipp as to all defendants. The Memphis Area Office of TDES is an "employment agency" within the meaning of Title VII 42 U.S.C. §2000e (b) and (c), and the other parties were appropriately named in Rule 19 to effectuate complete relief to the extent indicated. Charges under the post Civil War Civil Rights Acts, 42 U.S.C. §1981 and 1983 and under the 14th Amendment may be afforded separate relief. Johnson v. R.E.A., 43 U.S.L.W. 4623, ____U.S. ____ (5-19-75). See Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).

There was no bad faith indicated by TDES with regard to black employment opportunities following a seasonable opportunity to comply with the provisions of Title VII enacted in 1964. The employment practices of TDES, and particularly the Memphis Office, were facially neutral and non-discriminatory until approximately 1970. In respect

to the COMO program and efforts to solve chronic minority unemployment after that time, the Memphis Office, and TDES made some affirmative efforts, although not entirely effective to alleviate effects of past discrimination within the internal structure of the office and in its impact on the Memphis employment community. There was no freezing or limitation placed upon transfer or promotion insofar as blacks were concerned, despite the fact that seniority as well as testing capability and other pertinent considerations, were taken into account as to hiring and promotions. This is not a Griggs v. Duke Power Co., 401 U.S. 424 (1971) nor an EEOC v. Detroit Edison, 9 EPD ¶9997 _____ F.2d ____ (C.A. 1975) situation.

There was significant increase in number of black employees and in their advancement to higher paying positions during the years in dispute in the Memphis Office. Need for improvement, however, is specifically noted in the positions of manager, interviewer,[8/] and ERR.

8/ It is recognized that blacks are well represented as counsellors, clerks, typists and "agents" in that office.

There was a significant dispute between sincere experts who testified in this cause as to the effect of statistical studies and analysis and not only whether they indicated a prima facie case of employment discrimination, but also whether they indicated racial discrimination at all as to the effect of TDES services when factors of skill, education and experience were taken into account. This court does not find any basis to attribute to the Memphis Office of TDES a realistic causative force in the evident significant differences between white and black applicants as to skills, education and experience. Rather it seems apparent that the community itself, and the private sources of employment in the Memphis area, apart from the TDES, were the basic reason for differences in skill and experience. Many causes may be the reason or be suggested for differences found between the educational level of whites (or lack thereof) and that of black applicants to the Memphis TDES Office. Here again, this court does not attribute the blame for this condition upon any of the defendants in this cause.

Defendants' explanation of its practices did not indicate a system "loaded" or weighed against black applicants, nor did it demonstrate perfect procedures that would eliminate virtually all avenues for possible subtle discrimination. The use of job banks and the increasing proportion of blacks who receive consideration by referral to higher pay and higher skill jobs does tend to show not only good faith efforts to eradicate past effects of segregation and discrimination but also some effective affirmative steps to assist in upgrading opportunities for blacks at TDES.

It is a fact that most of the managers and top-level decision makers in the Memphis Office are white. Improvement, however, is reflected in the ratios in recent years so that blacks now have a real voice at most higher policy levels. The court does not find this fact alone a realistic basis for concluding that in its internal structure, the Memphis Office has been shown to be discriminatory in the availability of service to blacks, nor in affording opportunities for advancement. The court would hope and expect that state civil service procedures might be liberal-

ized so as to afford still greater opportunities to qualified black state employees of TDES to advance (and to be hired in the first instance). In view of current notoriety in this area, however, in other state Departments it is evident that lawmakers and the public are conscious of desirable reasons for and apparent purposes behind civil service procedures to remove state employees in agencies such as TDES from politics. Changes in these procedures so that the names of more blacks might appear on eligibility lists would have to emanate from the Department of Personnel and its commissioner. It has not, in any event, been demonstrated that blacks have been, for racial reasons, deliberately or by design omitted or eliminated from qualified eligibility lists by any of the defendants. Plaintiff has failed to show that present referral policies and practices of the defendants have an unlawful discriminatory impact upon black job applicants now, or that they perpetuate past effects of racial discrimination for which defendants may be deemed responsible.

The court has previously considered fully the individual case of Eroneous Shipp and rendered its opinion as to that cause of action. Upon

reconsideration in light of plaintiff's motion, the court reiterates its prior determination that judgment must also in that phase of the case be rendered for defendants.

Let judgment be entered for defendants accordingly and costs be assessed against plaintiff.

This _____ day of September, 1975.

Harry W. Wellford /s/
UNITED STATES DISTRICT COURT JUDGE

Filed: September 25, 1975

U.S. COURT OF APPEALS
SIXTH CIRCUIT

No. 76-1515, August 7, 1978

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ERONEOUS SHIPP, et al.

Plaintiffs,

- vs -

MEMPHIS AREA OFFICE, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Defendants.

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On Appeal from the United States District Court for the Western District of Tennessee. Affirmed in part and reversed in part.

Elijah Noel, Jr. (Ratner, Sugarmon, Lucas & Salky), Memphis, Tenn., Jack Greenberg, Morris J. Baller, and Eric Schnapper, New York, N.Y., and William E. Caldwell, Washington, D.C., on brief for appellant.

Henry Haile of Haile & Martin, P.A., Nashville, Tenn. (Brooks McLemore, Attorney General of Tennessee, and Sam J. McAllister, Chief Counsel, Tennessee Department of Employment Security, with him on brief) for appellees.

Before WEICK, CELEBREZZE and KEITH, Circuit Judges.

KEITH, Circuit Judge: -- Eroneous Shipp, a Black man, appeals from a judgment of the district court denying both individual and class claims against the Memphis Area Office of the Tennessee Department of Employment Security (TDES), the Tennessee Department of Personnel, and Jane Hardaway, its former Commissioner. Plaintiff commenced this action on September 16, 1971, on behalf of himself and all other similarly situated Black persons, alleging that TDES engaged in racial discrimination in its job referral services and that the Department of Personnel engaged in racial discrimination in its internal employment practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., 42 U.S.C §§1981-1985, and the Thirteenth and Fourteenth Amendments to the United States Constitution.[1/] We affirm in part and reverse in part.

On Friday, March 7, 1969, after hearing a TDES initiated radio advertisement soliciting applicants for a job as a traffic analyst, plaintiff telephoned the TDES office concerning the job. He was informed by a TDES interviewer that he was probably unqualified. Nevertheless, plaintiff obtained an application and went to the TDES office on Monday, March 10, 1969, seeking to be referred to the advertised job. He spoke this time with a TDES supervisor who refused to refer him because she believed the job required recent traffic rate experience and that plaintiff was unqualified. TDES had previously referred two white applicants to the job. The supervisor, however, called the employer, RCA, and was informed that the job already had been filled. Plaintiff believed he had been subjected to racial discrimination because he had informed the TDES interviewer that he had heard the job advertisement in a predominantly Black radio station and had attended a well-known predominantly Black college. Plaintiff filed charges against TDES with the EEOC and subsequently received a right-to-sue letter. The district court dismissed plaintiff's individual claim on the ground that plaintiff failed to prove that TDES had discriminated against him. The court found that TDES believed plaintiff was unqualified for the

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1/ Title VII jurisdiction over TDES was properly invoked pursuant to the Civil Rights Act of 1964, 42 U.S.C. §2000e(c). TDES is a federally funded employment service.

job and that the job was filled at the time of plaintiff's application. The district court also dismissed the class claims. On appeal plaintiff alleges that the district court erred in dismissing plaintiff's individual claim and class claims against TDES and the Department of Personnel.[2/]

This case came to trial following many years of discovery,during which a tremendous amount of statistical and other evidence was elicited. Over a three-day period, March 20-22, 1974, the district court heard all of the proofs on plaintiff's individual claim and plaintiff's proofs with respect to the class action aspect of the case. At the conclusion of this hearing, defendants moved for a directed verdict on the class claims. On June 13, 1974, the court entered an order stating that it would consider entering judgment on the individual claim without prejudice to the rights of the class involved, and that it would take under advisement defendants' directed verdict motion without prejudice to defendants' rights

2/ Counsel for plaintiff did not appear for oral argument.

under the motion to go forward with their proofs on the class action aspect of the case.

On December 20, 1974, the district court entered a five page order dismissing plaintiff's individual claim. Although the court noted that evidence was presented indicating segregation by race in TDES' referral services prior to 1964 and a preponderance of whites in managerial and interviewer positions, the court concluded that "Shipp himself has failed to demonstrate racial prejudice or discrimination against him in connection with his job application and his transactions" with TDES in 1969 and that Shipp "has failed to prove the charges made by him against any of the defendants."[3/]

Trial on the merits of the class claims was continued with presentation of defendants' proofs on April 23, 1975. Plaintiff subsequently moved the court to reconsider its December 20, 1974, order dismissing the individual claim. On September 25, 1975, the district court entered a memo-

3/ The district court further noted as pertinent the fact that plaintiff failed to prove any damage from TDES' failure to refer him to the RCA job. RCA's Memphis Operation closed approximately six months after the TDES incident and most employees lost their jobs, including the person hired by RCA from a private employment service prior to Shipp's application for the job.

randum opinion dismissing the class claims on the merits and reiterating its prior judgment on the individual claim. At no time did the district court define or certify the action as a class action.[4/] Rule 23, Fed.R.Civ. Pro. Plaintiff

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4/ Rule 23 of the Federal Rules of Civil Procedure provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class;

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

never motioned the court for class certification, nor did the district court certify the class sua sponte, Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976); Senter v. General Motors Corp., 532 F.2d 511, 12 FEP Cases 451 (6th Cir. 1976).

4/ Cont'd.

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair an efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirabilty or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment: Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is

Pursuant to Rule 23(c)(1) a district judge is required to determine by order "[a]s soon as

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4/ Cont'd.

to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

practicable after the commencement of an action" whether an action commenced as a class action

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4/ Cont'd.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any steps in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene the present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

is to be so maintained.[5] This Circuit had held that a district judge has an obligation sua sponte to determine whether an action shall proceed as a class action. Senter v. General Motors Corp., supra; Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974). In this case the district court never certified the class nor made any determination that the prerequisites for a class action were met, specifically, that plaintiff's claims were the claims of the class or that plaintiff would fairly and adequately protect the interests of the class pursuant to Rule 23(a). Nor did the district court make any determination that the action was properly maintainable as a class action pursuant to Rule 23(b).[6]

5/ The "as soon as practicable after the commencement of an action" language of Rule 23(c)(1) is mandatory. The district court has a duty to certify the class action whether requested to do so or not. Senter v. General Motors Corp., 532 F.2d at 520; Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974).

6/ There was and continues to be considerable disagreement among the parties as to whether this action was properly maintainable as a class action. The class action issues were not included in the pretrial order. However, it is indisputable that the case went to trial on the class action issues, both sides presenting proofs on this issue.

In East Texas Motor Freight Systems Inc. v. Rodriquez, [7] 431 U.S. 395 (1977), the Supreme Court reiterated its prior rulings that the procedural requirements of Rule 23 must be adhered to with diligence.

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involoving class-wide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the .

7/ In McBride v. Delta Air Lines,Inc., 551 F.2d 113 (6th Cir. 1977)(Weick, J. dissenting), this Court remanded the case back to the district court for a determination of the appropriate scope of the class in light of Tipler v. DuPont, 443 F.2d 125 (6th Cir. 1971), for findings of fact and conclusions of law on the charge that Delta had violated Title VII, and for appropriate class remedies if a violation were found. Our decision in McBride, however, was vacated and remanded by the Supreme Court for further consideration in light of East Texas Motor Freight Systems, Inc. v. Rodriquez, 431 U.S 395 (1977). On remand our Court affirmed the district court; McBride v. Delta Air Lines, Inc., No. 75-1955, Jan. 3, 1978 (Edwards, J., concurring).

> lawsuit will be an adequate representative of those who may have been the real victims of that discrimination. (emphasis added).

Id. at 405-06; See also Board of Commissioners v. Jacobs, 420 U.S. 128 (1975); Sosna v. Iowa, 419 U.S 393 (1975).

The need for certification is clear. When a district court certifies a class, the class of unnamed members acquires a legal status separate from the interests of the individual plaintiff.8/ Sosna v. Iowa, supra at 399. Moreover, certification has important consequences for unnamed members of the putative class. Where a suit such as this one proceeds to decision on the merits, the district court's judgment will bind all persons allegedly members of the class. Sosna v. Iowa, supra at 399 n.8.

Additionally, certification indicates whether the action is maintainable as a Rule 23(b)(1), 23(b)(2), or 23(b)(3) class, and what type of

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8/ In Board of Commissioners v. Jacobs, 420 U.S. 128 (1975), the Supreme Court further noted that where plaintiff students, who sued for violations of their First and Fourteenth Amendment rights to publish and distribute a school newspaper, had graduated and no longer had an interest to protect, the case was moot unless it had been duly certified, pursuant to rule 23. Id. at 129.

notice to class members, if any, is required pursuant to Rule 23(c). In this Court's opinion in Senter v. General Motors Corp., supra, Judge Celebrezze noted the following procedure to be followed in this Circuit in class action cases:

> The proper procedure, of course, would have been for Appellant's attorney to indicate in the complaint that the suit was brought as a class action under Rule 23 and to identify the relevant subheading of the rule. Also, the District Court should have ruled on the maintainability of the class action "as soon as practicable" after commencement of the action. (emphasis added).

Id. at 522.

The district court here found after three days of testimony and examination of numerous exhibits, and after presentation of the evidence as to the TDES employees' belief that plaintiff was unqualified for the job and that the job already had been filled, that plaintiff had not been discriminated against. These findings

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8/ Cont'd.

> The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initially named plaintiffs prior to the exhaustion of appellate review.

Id. at 130.

are not clearly erroneous. Plaintiff did not suffer injury as a result of the alleged discriminatory practices and thus is not eligible to represent a class of persons who allegedly did suffer injury; that is, those Black persons who were, are, or will be discriminated against because of TDES' referral practices.[9/] East Texas Motor Freight Systems, Inc. v. Rodriguez, supra at 403-04.

9/ Plaintiffs in Rodriguez had failed to move for certification of their class action allegations in the district court. The district court, noting this failure, dismissed the class action and additionally found against the individual plaintiffs. On appeal the Court of Appeals for the Fifth Circuit "discounted entirely plaintiffs' failure to move for certification" and certified the class on its own motion. East Texas Motor Freight Systems, Inc. v. Rodriguez, supra at 401. The Supreme Court found that the Court of Appeals plainly erred in declaring a class action "for the simple reason that it was evident by the time the case reached that court that the named plaintiffs were not proper class representatives under Fed. R.Civ.Pro. 23(a)." Id. at 403.

> Even assuming, as a number of courts have held, that a district judge has an obligation on his own motion to determine whether an action shall proceed as a class action. See,

Plaintiff's individual claim was dismissed and no certification whatsoever took place. Nonetheless, the district court proceeded to decide the merits of the class claims in the absence of a class representative, much less one who would fairly and adequately protect the interests of the class of persons allegedly discriminated against by TDES referral services,[10/] or the class of persons allegedly injured by the internal hiring and promotion practices of the

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9/ Cont'd.

> e.g., Senter v. General Motors Corp., 532 F.2d 511, 520-521 (CA6); Garrett v. City of Hamtramck, 503 F.2d 1236, 1243 (CA6), Castro v. Beecher, 459 F.2d 725, 731 (CA1), the named plaintiffs' failure to protect the interests of class members by moving for certification surely bears strongly on the adequacy of the representation that those class members might expect to receive. (citations omitted).

Id. at 405.

See generally Developments in the Law: Class Actions, 89 Harv. L. Rev. 1319 (1976); Note, Rizzo v. Goode: The Burger Court's Continuing Assault on Federal Jurisdiction, 30 Rutgers L. Rev. 103 (1976).

10/ In Rodriguez the Supreme Court noted that

> [w]here no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record,

Department of Personnel. Rogers v. Paul, 383 U.S. 198 (1965). Furthermore, it is abundantly clear that plaintiff never was an employee of TDES and in fact never had applied for a job at TDES. We, therefore, fail to see how it can be said that plaintiff's claims are typical of the class of TDES employees who were, are, or will be discriminated against because of the internal hiring and promotion practices of the Department of Personnel. Rule 23(a)(3).

Senter v. General Motors Corp., supra, and Alexander v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, AFL-CIO, 565 F.2d 1364 (6th Cir. 1977), cert. denied ____ U.S. ____ (1978), 46 LW 3751 (June 6, 1978), are not dispositive of this case. In both Senter and Alexander the named plaintiffs were found to be proper class representatives

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10/ Cont'd.
including the facts developed at the trial of the plaintiffs' individual claims.

East Texas Motor Freight Systems, Inc. v. Rodriguez, supra at 406 n.12.

Even assuming that the district court erred in dismissing plaintiff's individual claim before completion of trial on the merits of the class claims, the individual claim was reconsidered upon plaintiff's motion and disposed of by the district court's opinion dismissing the class claims.

with claims typical of the class. Senter v. General Motors Corp., 532 F.2d at 525; Alexander v. Aero Lodge No. 735, 565 F.2d at 1373. In the instant case, however, the district court ruled against Shipp's individual claim and this action left the purported class without a proper class representative. Where, as here, it is clear that the named plaintiff is not a proper class representative under Rule 23(a), certification is improper. East Texas Motor Freight Systems, Inc. v. Rodriguez, supra, at 403.

This is not a case where a class was appropriately certified and it later developed that the named plaintiff was an inappropriate class representative. In that case, the class claims would not be mooted or destroyed. Here, the district court failed to certify the class even after trial on the merits of the individual and class claims. As the Supreme Court said in Board of Commissioners v. Jacobs, supra at 130:

> Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint.

This complaint must be dismissed as to the purported class of persons allegedly discriminated against by TDES' referral policies, the purported class of persons allegedly injured by the Department of Personnel's internal employment practices, and the purported class of TDES employees allegedly discriminated against by the Department's internal employment practices because the named plaintiff is not an appropriate class representative within the meaning of Rule 23(a), his individual claim having been dismissed from this action prior to any certification. Because of our disposition of the case, we do not reach the merits of the class claims or the other issues raised by this appeal.

The district court's dismissal of plaintiff's individual claim is affirmed. The judgment of the district court with respect to the class claims is reversed and the case remanded with instructions to the district court to vacate its judgment and to dismiss the complaint for failure to comply with Rule 23.

Costs are assessed against the appellant Eroneous Shipp

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
WESTERN DIVISION

No. 76-1515

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ERONEUS SHIPP, et al.,

Plaintiffs-Appellants,

v.

MEMPHIS AREA OFFICE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Defendants-Appellees.

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Before: WEICK, CELEBREZZE, and KEITH, Circuit Judges.

Upon consideration of plaintiffs-appellants' "Petition for Rehearing" and "Motion" we are of the opinion that the issues were adequately discussed in our opinion and that the petition for rehearing is without merit.

We are further of the opinion that we do not have jurisdiction to add new parties to the appeal.

IT IS THEREFORE ORDERED that the petition for rehearing and the motion to add plaintiffs be, and they are hereby, denied.

ENTERED BY ORDER OF THE COURT

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Clerk

Filed: October 26, 1978